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## HOUSE BILL NO. 1473

Offered January 11, 2017

Prefiled December 12, 2016

A BILL to amend the Code of Virginia by adding in Chapter 4 of Title 18.2 an article numbered 9.1, consisting of sections numbered 18.2-76.3 through 18.2-76.9, relating to the Pain-Capable Unborn Child Protection Act; penalty.

Patrons—LaRock, Anderson, Austin, Bell, Richard P., Byron, Campbell, Cline, Cole, Collins, Cox, Davis, Dudenhefer, Edmunds, Fariss, Fowler, Freitas, Gilbert, Helsel, Howell, Hugo, Ingram, Kilgore, Lingamfelter, Marshall, D.W., Massie, Morefield, Morris, O'Bannon, Orrock, Peace, Pogge, Poindexter, Ransone, Ware, Webert, Wilt and Wright; Senators: Black, Carrico, Chase, Peake, Reeves, Ruff, Stanley, Suetterlein, Vogel and Wagner

Referred to Committee for Courts of Justice

Whereas, pain receptors (nociceptors) are present throughout the unborn child's entire body by no later than 16 weeks after fertilization, and nerves link these receptors to the brain's thalamus and subcortical plate by no later than 20 weeks; and

Whereas, by eight weeks after fertilization, the unborn child reacts to touch. After 20 weeks, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example, by recoiling; and

Whereas, in the unborn child, application of such painful stimuli is associated with significant increases in stress hormones known as the stress response; and

Whereas, subjection to such painful stimuli is associated with long-term harmful neurodevelopmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral, and learning disabilities later in life; and

Whereas, for the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared with their level when painful stimuli are applied without such anesthesia; and

Whereas, the position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than 20 weeks after fertilization predominantly rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain; and

Whereas, substantial evidence indicates that children born missing the bulk of the cerebral cortex, those with hydranencephaly, nevertheless experience pain; and

Whereas, in adults, stimulation or ablation of the cerebral cortex does not alter pain perception, while stimulation or ablation of the thalamus does; and

Whereas, substantial evidence indicates that structures used for pain processing in early development differ from those of adults, using different neural elements available at specific times during development, such as the subcortical plate, to fulfill the role of pain processing; and

Whereas, the position, asserted by some medical experts, that the unborn child remains in a coma-like sleep state that precludes the unborn child's experiencing pain is inconsistent with the documented reaction of unborn children to painful stimuli and with the experience of fetal surgeons who have found it necessary to sedate the unborn child with anesthesia to prevent the unborn child from thrashing about in reaction to invasive surgery; and

Whereas, consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain by 20 weeks after fertilization; and

Whereas, it is the purpose of the Commonwealth to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain; and

Whereas, the Commonwealth's compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain is intended to be separate from and independent of the Commonwealth's compelling state interest in protecting the lives of unborn children from the stage of viability, and neither state interest is intended to replace the other; and

Whereas, mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the Supreme Court of the United States noted that

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an explicit statement of legislative intent specifically made applicable to a particular statute is of greater weight than a general savings or severability clause, it is the intent of the Commonwealth that if any one or more provisions, sections, subsections, sentences, clauses, phrases, or words of this article or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this article shall remain effective notwithstanding such unconstitutionality. Moreover, the Commonwealth declares that it would have passed this article, and each provision, section, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provisions, sections, subsections, sentences, clauses, phrases, or words, or any of their applications, were to be declared unconstitutional; now, therefore,

**Be it enacted by the General Assembly of Virginia:**

**1. That the Code of Virginia is amended by adding in Chapter 4 of Title 18.2 an article numbered 9.1, consisting of sections numbered 18.2-76.3 through 18.2-76.9, as follows:**

*Article 9.1.*

*Pain-Capable Unborn Child Protection Act.*

**§ 18.2-76.3. Definitions.**

*For purposes of this article, unless the context requires a different meaning:*

*"Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child who died as the result of natural causes in utero, accidental trauma, or a criminal assault on the pregnant woman or her unborn child and which causes the premature termination of the pregnancy.*

*"Attempt to perform or induce an abortion" means an act, or an omission of a statutorily required act, that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance or induction of an abortion in the Commonwealth, in violation of this article.*

*"Department" means the Department of Health.*

*"Fertilization" means the fusion of a human spermatozoon with a human ovum.*

*"Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman that it necessitates the immediate abortion of her pregnancy without first determining postfertilization age to avert her death or for which the delay necessary to determine postfertilization age will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct that she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.*

*"Physician" means any person licensed to practice medicine or osteopathic medicine in the Commonwealth pursuant to Chapter 29 (§ 54.1-2900 et seq.) of Title 54.1.*

*"Postfertilization age" means the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum.*

*"Probable postfertilization age of the unborn child" means what, in reasonable medical judgment, will with reasonable probability be the postfertilization age of the unborn child at the time the abortion is planned to be performed or induced.*

*"Reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.*

*"Unborn child" or "fetus" means an individual organism of the species Homo sapiens from fertilization until live birth.*

*"Woman" means a female human being whether or not she has reached the age of majority.*

**§ 18.2-76.4. Determination of postfertilization age.**

*A. Except in the case of a medical emergency, no abortion shall be performed or induced or be attempted to be performed or induced unless the physician performing or inducing it has first made a determination of the probable postfertilization age of the unborn child or relied upon such a determination made by another physician. In making such a determination, the physician shall make such inquiries of the woman and perform or cause to be performed such medical examinations and tests as a reasonably prudent physician, knowledgeable about the case and the medical conditions involved, would consider necessary to perform in making an accurate diagnosis with respect to postfertilization age.*

*B. Failure by any physician to conform to any requirement of this section constitutes unprofessional conduct.*

**§ 18.2-76.5. Abortion of unborn child of 20 or more weeks postfertilization age prohibited.**

*A. No person shall perform or induce or attempt to perform or induce an abortion upon a woman*

when it has been determined by the physician performing or inducing or attempting to perform or induce the abortion or by another physician upon whose determination that physician relies that the probable postfertilization age of the woman's unborn child is 20 or more weeks, unless, in reasonable medical judgment, she has a condition that so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No such serious risk shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct that she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

B. When an abortion upon a woman whose unborn child has been determined to have a probable postfertilization age of 20 or more weeks is not prohibited by subsection A, and if the woman elects to have an abortion, the physician shall terminate the pregnancy in the manner that in reasonable medical judgment provides the best opportunity for the unborn child to survive, unless, in reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the woman than would other available methods. No such greater risk shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct that she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

**§ 18.2-76.6. Criminal penalties.**

Any person who intentionally or recklessly performs or induces or attempts to perform or induce an abortion in violation of this article is guilty of a Class 4 felony. No penalty may be assessed against the woman upon whom the abortion is performed or induced or attempted to be performed or induced.

**§ 18.2-76.7. Civil remedies.**

A. Any woman upon whom an abortion has been performed or induced in violation of this article, or the father of the unborn child who was the subject of such an abortion, may maintain an action against the person who performed or induced the abortion in intentional or reckless violation of this article for actual and punitive damages. Any woman upon whom an abortion has been attempted in violation of this article may maintain an action against the person who attempted to perform or induce the abortion in an intentional or reckless violation of this article for actual and punitive damages.

B. A cause of action for injunctive relief against any person who has intentionally or recklessly violated this article may be maintained by the woman upon whom an abortion was performed or induced or attempted to be performed or induced in violation of this article; by any person who is the spouse, parent, sibling, or guardian of, or a current or former licensed health care provider of, the woman upon whom an abortion has been performed or induced or attempted to be performed or induced in violation of this article; by a county or city attorney with appropriate jurisdiction or by the Attorney General. The injunction shall prevent the abortion provider from performing or inducing or attempting to perform or induce further abortions in violation of this article in the Commonwealth.

C. If judgment is rendered in favor of the plaintiff in an action described in this section, the court shall also render judgment for a reasonable attorney fee in favor of the plaintiff against the defendant.

D. If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney fee in favor of the defendant against the plaintiff.

E. No damages or attorney fees may be assessed against the woman upon whom an abortion was performed or induced or attempted to be performed or induced except in accordance with subsection D.

**§ 18.2-76.8. Protection of privacy in court proceedings.**

In every civil or criminal proceeding or action brought under this article, the court shall rule whether the anonymity of any woman upon whom an abortion has been performed or induced or attempted to be performed or induced shall be preserved from public disclosure if she does not give her consent to such disclosure. The court, upon motion by a party or upon its own motion, shall make such a ruling and, upon determining that her anonymity should be preserved, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each such order shall be accompanied by specific written findings explaining why the anonymity of the woman should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive alternative exists. In the absence of written consent of the woman upon whom an abortion has been performed or induced or attempted to be performed or induced, anyone, other than a public official, who brings an action under subsection A or B of § 18.2-76.7 shall do so under a pseudonym. This section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant or from attorneys for the defendant.

**§ 18.2-76.9. Construction.**

*This article is supplemental to and shall be read in pari materia with Article 9 (§ 18.2-71 et seq.) and shall not be construed to repeal, by implication or otherwise, any provision of Article 9 (§ 18.2-71 et seq.) or any otherwise applicable provision of law regulating or restricting abortion. An abortion that complies with this article but violates any provision of Article 9 (§ 18.2-71 et seq.) or any otherwise applicable provision of law shall be deemed unlawful as provided in such provision. An abortion that complies with the provisions of Article 9 (§ 18.2-71 et seq.) or any otherwise applicable provision of law regulating or restricting abortion but violates this article shall be deemed unlawful as provided in this article.*

**2. That the provisions of this act may result in a net increase in periods of imprisonment or commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 780 of the Acts of Assembly of 2016 requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.**